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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO*

Public Document

**Prosecution's Response to the Kilolo Defence's Request for Leave to Appeal the
"Decision on Kilolo Defence Motion for Inadmissibility of Material"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The motion filed by Counsel for Mr Kilolo,¹ seeking leave to appeal the decision declining to exclude certain evidence,² expresses no more than disagreement with the Trial Chamber. Impermissibly, it reprises many of its unsuccessful arguments on the merits,³ challenging the Decision as a whole rather than identifying one or more specific or discrete issues for certification. After at least 15 reasoned decisions on applications for leave to appeal in this case, to date,⁴ this basic error is unfortunate. Alone, it requires the Motion to be dismissed.

2. Moreover, the point of law challenged by the Kilolo Defence—the crime/fraud exception to legal professional privilege—was not first articulated in the Decision, but has been the subject of numerous previous decisions both of this Trial Chamber and the Single Judge of the Pre-Trial Chamber.

3. In any event, nothing in the Motion demonstrates that the requirements for an interlocutory appeal under article 82(1)(d) of the Rome Statute have been met, and so leave to appeal may not be granted.⁵

¹ ICC-01/05-01/13-1274 (“Motion”).

² ICC-01/05-01/13-1257 (“Decision”).

³ See generally ICC-01/05-01/13-1140.

⁴ Fourteen of these decisions are public: see e.g. ICC-01/05-01/13-1282 (“Redactions ALA Decision”); ICC-01/05-01/13-1278 (“Disclosure ALA Decision”); ICC-01/05-01/13-1258 (“Opening Statement ALA Decision”); ICC-01/05-01/13-1096 (“Independent Counsel ALA Decision”); ICC-01/05-01/13-1089; ICC-01/05-01/13-966; ICC-01/05-01/13-877 (“Babala ALA Decision”); ICC-01/05-01/13-801 (“Confirmation ALA Decision”); ICC-01/05-01/13-502; ICC-01/05-01/13-456; ICC-01/05-01/13-348; ICC-01/05-01/13-342; ICC-01/05-01/13-187; ICC-01/05-01/13-51.

⁵ *Contra* Motion, para. 29.

II. Submissions

4. Since the Motion fails to identify any appealable issue arising from the Decision, it must be dismissed. Nor *arguendo* do the very general submissions on the merits of the Decision show any issue which significantly affects the fairness and expedition of the proceedings, or the outcome of the trial. The immediate intervention of the Appeals Chamber will not materially advance the proceedings.

A. The Motion fails to identify any issue arising from the Decision

5. The Motion fails to meet the threshold requirement of any application for leave to appeal, which is the identification of an ‘appealable’ issue genuinely arising from the Decision. Indeed, it fails to identify any discrete issue. And its generalised arguments on the merits of the Decision address a matter, the crime/fraud exception, which the Decision itself emphasises to have been the subject of multiple previous decisions in this case. Since “the leave to appeal criteria are cumulative”, these flaws alone mean that the Motion “must be rejected.”⁶

i. The Motion identifies no discrete issue at all

6. Ignoring the consistent jurisprudence of this Trial Chamber, and of other Chambers, the Motion fails to identify any discrete issue in the Decision to certify for appeal.

7. Less than a month ago, the Single Judge (and Presiding Judge) of the Trial Chamber) “emphasise[d] that, for the purposes of the first prong” of article 82(1)(d), “the Appeals Chamber defined an ‘issue’ as ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement

⁶ See Babala ALA Decision, para. 9. See also Confirmation ALA Decision, para. 2.

or conflicting opinion’.”⁷ Such issues must, moreover, be of such significance in the context that their resolution is “essential for the determination of matters arising in the judicial cause under examination.”⁸

8. Just six months ago—and re-emphasised only the day before filing this response—the Trial Chamber reminded the Parties:

The definition of an appealable issue requires the parties to articulate **discrete** issues for Appeals Chamber resolution—it is generally insufficient to argue that the entirety of the Chamber’s reasoning is erroneous when requesting leave to appeal.⁹

9. The Trial Chamber further explained that an issue proposed for certification is impermissibly vague or not “discrete enough” if it fails to “clearly identify[] any specific error”. Arguments amounting to a mere assertion “that ‘the decision erred’ or ‘the decision was wrong’”, or that “amount to little more than challenging the totality of the [impugned decision’s] reasoning”, may not be certified for appeal.¹⁰

10. Similarly, the Single Judge of the Pre-Trial Chamber reminded the Parties that simply “proposing an alternative interpretation” of a legal provision likewise may not “qualify as an appealable issue for the purpose of granting leave to lodge an *interlocutory* appeal”.¹¹ He continued,

⁷ Opening Statement ALA Decision, para. 8 (citing ICC-01/04-168 (“DRC Appeal Decision”), para. 9).

⁸ DRC Appeal Decision, para. 9.

⁹ Babala ALA Decision, para. 7 (emphasis supplied, citing ICC-01/09-01/11-596, para. 11; ICC-02/11-01/11-307, para. 70). See also Redactions ALA Decision, para. 10; STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals against Trial Chamber’s ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 5 August 2013, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/2433-f0007ar902> (accessed 22 September 2015), para. 10; STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/TC, Decision on Defence Motions for Certification for Appeal of the Trial Chamber’s 13 September 2013 ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 9 October 2013, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/2543-f1140> (accessed 22 September 2015), para. 2.

¹⁰ See Babala ALA Decision, paras. 10-11; Redactions ALA Decision, para. 10.

¹¹ Confirmation ALA Decision, para. 17 (emphasis supplied).

[H]olding otherwise would result in obliterating the difference between interlocutory appeals and appeals pursuant to article 81 of the Statute, which is the proper procedural avenue where alternative views to the ones held by the Trial Chamber can be subjected to the scrutiny of the Appeals Chamber, once the matter has been extensively debated at trial.¹²

11. Accordingly, only discrete issues with a significant impact on the conduct or outcome of the ongoing proceedings, and whose immediate resolution will materially advance the proceedings, are amenable to interlocutory appeal in the meaning of article 82(1)(d). Such issues will almost always identify a *specific* error. Challenges to the ‘correctness’ of a decision, in the abstract, are insufficient to meet this test, and must be left to any direct appeal under article 81, at the conclusion of the trial.

12. The Motion ignores all this guidance. Instead, it effectively seeks permission to re-argue the merits of the crime/fraud exception *de novo* before the Appeals Chamber, and by this means potentially to obtain an alternative ruling from a different body.

13. The failure to identify a discrete ‘appealable’ issue (or issues) in the Decision is manifest, leaving the Parties and the Trial Chamber either to conclude that every aspect of the Decision is challenged or to guess at the specific concerns of the Kilolo Defence. Thus, although the Motion refers colloquially to the “importance of the issues arising in this application”,¹³ it asserts only that “[t]he *Decision* significantly

¹² Confirmation ALA Decision, para. 17.

¹³ Motion, para. 6. *See also* paras. 8 (“the issues raised on this appeal”), 9 (asserting that appellate determination of “the issues” is required).

affects the fair and expeditious conduct of the proceedings”.¹⁴ This is an elision of the distinct requirements of article 82(1)(d) for a “decision” involving an “issue” that has the necessary impact on the proceedings to justify interlocutory appeal.¹⁵

14. To the extent *arguendo* that the Motion refers to any issues at all,¹⁶ those issues are expressly based on the failure to agree with the “Defence complain[ts]” in its original request to the Trial Chamber.¹⁷ This amounts to little more than a challenge to the totality of the reasoning of the Decision.¹⁸ As such, even if the Motion may be understood to propose these issues as the object of its request for certification, they are overly vague and do not meet the requirements of article 82(1)(d). The same applies to the extent that the Motion asserts that the Decision did not “sufficiently uphold [...] the protection” in article 67(1)(b) of the Statute.¹⁹

ii. The Motion identifies no issue arising from the Decision

15. The Trial Chamber has also very recently reminded the Parties that an issue must genuinely arise from the impugned decision.²⁰ Where an issue is premised on an “erroneous assertion” that the Chamber “decided” on a particular matter, it fails to meet this requirement.²¹

¹⁴ Motion, p. 5 (sub-title, emphasis added). See also p. 8 (sub-title reading “The *Decision* could affect the outcome of the trial”, emphasis added).

¹⁵ See Statute, art. 82(1)(d) (permitting interlocutory appeals of “[a] decision *that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings*”, etc, emphasis added).

¹⁶ See Motion, para. 11 (referring to “[t]he two issues” in the previous paragraph).

¹⁷ See Motion, para. 10 (“The Defence complained: (i) That the ICC regime, unlike those at some other international tribunals, contains no explicit crime/fraud exception; and (ii) That the absence of any pre-existing framework means the interference with lawyer/client communications is not ‘in accordance with the law’”).

¹⁸ See Decision, paras. 12-14, 17-22.

¹⁹ See Decision, para. 7.

²⁰ See e.g. Disclosure ALA Decision, paras. 9-10.

²¹ See Disclosure ALA Decision, para. 9. See also ICC-02/11-01/15-117 (“*Gbagbo and Blé Goudé* Trial Date ALA Decision”), para. 19 (“the Chamber will first consider whether the issue or issues identified by the party arise *from the operative part* of the Decision. For example, if an issue put forward by a party misstates or misapprehends the disposition of the Chamber, it cannot be said to have arisen from the decision as such and must be dismissed”, emphasis added).

16. The Decision emphasised that, “when the Single Judge [of the Pre-Trial Chamber] first authorised the collection of these materials, he determined that communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege”.²² It further recalled that the Trial Chamber “also determined that there is a crime/fraud exception to legal professional privilege” in a previous decision,²³ for which it denied a request (by Counsel for Mr Bemba) for leave to appeal.²⁴ The Motion concedes as much.²⁵

17. It follows that the Decision did not decide on the existence of the crime/fraud exception but merely applied the legal analysis from previous decisions in this case. The Trial Chamber’s continued agreement with that analysis²⁶ does not make that previous analysis necessarily an issue arising from *this* Decision.²⁷ Nor does the Motion even attempt to argue this position. Rather, the Motion simply regurgitates the Kilolo Defence’s view of the law on the merits. This fails to meet the standard required for granting leave to appeal.²⁸

²² Decision, para. 12 (citing ICC-01/05-52-Red2, paras.3-5; ICC-01/05-01/13-408, p.5).

²³ Decision, para. 13 (citing ICC-01/05-01/13-947, paras. 14-15, which assert for example that “communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege”).

²⁴ See Independent Counsel ALA Decision. The Kilolo Defence did not join this application, whose first issue was “[w]hether communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege, as set out in Rule 73(1) of the Rules”: see Independent Counsel ALA Decision, paras. 2, 6.

²⁵ See Motion, para. 14 (observing that “consideration of the proper scope of legal professional privilege has vexed every stage of these proceedings” and “there have been a plethora of decisions on the issue”). See also paras.12-13.

²⁶ See Decision, para. 13.

²⁷ See e.g. ICC-02/11-01/15-132, paras. 4-5 (concluding, *inter alia*, that an issue based on “findings reached in decisions other than the Impugned Decision [...] cannot satisfy” article 82(1)(d) of the Statute). See also ICC-02/11-01/15-182, para. 5.

²⁸ See e.g. *Gbagbo and Blé Goudé* Trial Date ALA Decision, paras. 20 (“in deciding on a request for leave to appeal, a Trial Chamber is not concerned with the correctness of the impugned decision, *per se*; determination of whether the Chamber erred is a matter for the Appeals Chamber should leave be granted. Rather, the role of the Trial Chamber is simply to determine whether any of the issues presented by the parties seeking leave meet the requirements as set out in Article 82(1)(d)”), 22 (“to the extent that the issues raised [...] either (1) repeat prior arguments or (2) express mere disagreement with the Chamber’s reasoning and conclusions [...], these issues cannot warrant certification for appeal”); ICC-02/11-01/15-42, para. 14 (“It is insufficient to argue that the impugned decision was not correctly reasoned (that the impugned decision may be wrong) or that it involves an important area of law”). See also STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/1963-f0008ar1262> (accessed 22 September 2015), para. 13; ICTY, *Prosecutor v. Haradinaj et al*, IT-04-84bis-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65ter Witness and Exhibit Lists and

B. The requirements of article 82(1)(d) are not met

18. The Motion's failure to identify an appealable issue arising from the Decision also precludes it satisfying the enumerated requirements of article 82(1)(d), which contemplate "a specific link between the issue" and the procedural impact and urgency implicit in the criteria required for leave to appeal.²⁹

i. The Motion shows no issue which significantly affects the fairness of the proceedings or the outcome of the trial

19. The claim that the fairness of the proceedings is significantly affected—by *any* aspect of the Decision—rests solely on the assertion, in the view of the Kilolo Defence, that the precise legal contours of the crime/fraud exception have not been adequately delimited. Thus, although the Kilolo Defence concedes that the Decision found "the ICC regime" to be "sufficiently foreseeable, and that it sets forth with sufficient precision the conditions" in which the crime/fraud exception "may be applied",³⁰ the Motion nonetheless asserts that "important questions" remain unanswered.³¹ These include "when, how, in what circumstances and with what protections" the crime/fraud exception applies,³² and "the requisite threshold of suspicion of criminal conduct that must be reached, presented and endorsed".³³

20. These questions mistake the nature of the crime/fraud exception, which is not "an *interference* with lawyer/client privilege"³⁴ but, as has repeatedly been stated, an

Admit Evidence Pursuant to Rule 92ter, 15 March 2012, available at <http://www.icty.org/x/cases/haradinaj/tdec/en/120315.pdf> (accessed 22 September 2015), para. 9.

²⁹ See *Gbagbo and Blé Goudé* Trial Date ALA Decision, para. 23.

³⁰ Motion, para. 18 (citing Decision, para. 20).

³¹ See Motion, para. 19.

³² Motion, para. 19.

³³ Motion, para. 20.

³⁴ *Contra* Motion, para. 18 (emphasis added). See also paras. 19-20.

*exception*³⁵—a circumstance in which the privilege does not apply.³⁶ Accordingly, although the Prosecution, out of an abundance of caution, sought “[j]udicial authorisation” for certain investigative measures as a “safeguard”,³⁷ the legal regime envisioned by the Kilolo Defence is misconceived. As the Decision stressed, the measures taken by the Prosecution were adequately grounded in provisions such as articles 54 and 70 of the Statute, and rule 165(1) of the Rules of Procedure and Evidence.³⁸

21. The Kilolo Defence also overlooks the previous guidance provided by the Trial Chamber as to the circumstances in which the crime/fraud exception applies, which stressed that “it suffices to repeat the clear and circumscribed definition of the ‘crime/fraud exception’ [already] provided [...]: ‘communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege’.”³⁹

22. In any event, even if the Kilolo Defence were correct in its view of the legal regime, the Motion makes no showing that *ex ante* guidance on “the modalities and protections that must be in place” for investigative measures potentially relating to privileged material is required for the fairness of *these* proceedings, let alone their expeditious conduct.⁴⁰ To the contrary, the evidence in this case is already collected. Both the Single Judge of the Pre-Trial Chamber and the Trial Chamber have already ruled that the Prosecution acted lawfully, and noted the procedural safeguards which have been implemented.⁴¹ Nor is there any indication that these safeguards

³⁵ See *above* para. 16.

³⁶ See *also* Decision, para. 23 (noting that the “Kilolo Defence has misapprehended which communications qualify as privileged”).

³⁷ See Decision, para. 18.

³⁸ See Decision, paras. 18-20.

³⁹ Independent Counsel ALA Decision, para. 10.

⁴⁰ *Contra* Motion, para. 22 (“Conclusive resolution of these important issues before trial will plainly affect both the fair and expeditious conduct of proceedings”). See *also* para. 8 (emphasising the significance of “the issues raised on this appeal” more widely, “to all lawyers and accused appearing before the ICC”).

⁴¹ See Decision, para. 13.

have been inadequate in practice.⁴² In this context, the Kilolo Defence's assertion that relevant evidence may yet be excluded is speculative, as well as a manifest disagreement with the Decision, which declined to exclude such material.⁴³

23. The Kilolo Defence is further incorrect to assert that the application of the crime/fraud exception necessarily requires intervention "at the highest level", either "by all judges participating in the formulation [of] a Code of Practice" or in an "authoritative decision" by "the Appeals Chamber".⁴⁴ To the contrary, for the present purposes, the decisions of this Trial Chamber are sufficiently authoritative. The safety of any convictions based on this approach, and related evidence, may in due course be tested by the Appeals Chamber. Interlocutory appeal is not a device to obtain an 'advisory' opinion where the circumstances do not imperatively require. Indeed, such a measure is contrary to the expeditious conduct of proceedings, to which the Parties are entitled.⁴⁵

24. The alternative argument in the Motion that certification should be granted because the exclusion of evidence "could, self-evidently, have an impact on the outcome of the trial" also fails to satisfy article 82(1)(d).⁴⁶ First, the party seeking leave to appeal on this basis must show, in the language of the Statute, that the appealable issue "*would* significantly affect [...] the outcome of the trial".⁴⁷ The mere possibility that the outcome "could" be affected does not suffice. Second, as the Kilolo Defence rightly concedes, even if the Appeals Chamber ruled that the Decision was erroneous, this would not necessarily lead to the exclusion of

⁴² Decision, para. 14.

⁴³ *Contra* Motion, para. 22 ("Evidence that the Prosecution seeks to rely upon could be excluded and the issues for trial narrowed considerably").

⁴⁴ *Contra* Motion, paras. 14, 17.

⁴⁵ See Statute, arts. 67(1)(c), 82(1)(d).

⁴⁶ *Contra* Motion, para. 23.

⁴⁷ Statute, art. 82(1)(d) (emphasis added).

evidence.⁴⁸ In this light, these arguments are simply too speculative to warrant certification.

ii. *Immediate resolution by the Appeals Chamber will not materially advance the proceedings*

25. The Motion also fails to show that the intervention of the Appeals Chamber will materially advance the proceedings. As previously stated, interlocutory appeals are not a mechanism for providing “[a]uthoritative guidance”, in the abstract,⁴⁹ and the possibility of evidence being excluded is no more than speculation.⁵⁰ Nor are the “particularly unusual” circumstances of the case as a whole material.⁵¹ To the contrary, they merely emphasise that the arguments in the Motion are matters for any eventual appeal under article 81, but not 82(1)(d).⁵²

III. Relief requested

26. For all the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 25th day of September 2015
At The Hague, The Netherlands

⁴⁸ See Decision, para. 23 (“reversal of the Decision *may* lead to the exclusion of evidence”, emphasis added). See also Independent Counsel ALA Decision, para. 9 (“The Chamber notes that, even assuming *arguendo* that it erred in defining the ‘crime/fraud exception’, this does not necessarily and automatically mean that material erroneously provided to the Prosecution would be inadmissible”).

⁴⁹ *Contra* Motion, para. 28. See above paras. 8-11, 23.

⁵⁰ *Contra* Motion, para. 24. See above paras. 22, 24.

⁵¹ *Contra* Motion, paras. 25-26.

⁵² See above paras. 10, 23.